The Victims' Bill of Rights - An Equal Protection Problem?

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Assume you are a private lawyer trying to make ends meet and in walks potential client John Smith. He is charged with aggravated assault by the state and is being sued by the victim for monetary damages in civil court.

Mr. Smith retains you to handle both the criminal and civil cases. The first thing you want to do is to interview the victim to learn her version of the incident. However, you remember that the Victims' Bill of Rights requires you to communicate with her through the prosecutor and that she can refuse to be interviewed. You make the standard request to the prosecutor and many weeks later you learn she refuses to talk with you. Not all is lost because you believe you can depose her in the civil case.

However, you are disturbed by this differing treatment in the two forums and wonder why you can interview the victim in one forum but not in the other. There is no rational or acceptable explanation for this different treatment, and, therefore, I suggest the scheme violates the Equal Protection Clause of the United States Constitution.[1]

Article II, §2.1(A)(5) of the Arizona Constitution provides that victims have the right "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Generally, a criminal defendant has no constitutional right to pretrial discovery,[2] including the right to interview witnesses.[3] However, Arizona chose to create a right to discovery in criminal cases. There is no question that when a state creates a right it must do so without violating federal constitutional provisions whether or not the federal constitution itself establishes the underlying right. Prior to enactment of the Victims' Bill of Rights, criminal defendants in Arizona had broad discovery rights with virtually the same right to interview victims and witnesses as civil defendants.[4] Now, however, criminal defendants and their attorneys are treated differently than their civil counterparts.

The differing treatment is based on unsupported and unwarranted assumptions that criminal defendants and their lawyers harass and intimidate victims. Are criminal defense lawyers more likely to mistreat victims than civil attorneys? And what if, as in the above hypothetical, the criminal defendant is also a civil defendant and the same attorney represents the defendant in both actions? The alleged "mistreatment of victims" argument does not constitutionally justify the disparate treatment at issue here.

No appellate case in the United States has directly addressed whether providing civil litigants more pretrial discovery rights than criminal defendants violates the Equal Protection Clause. However, a few cases have mentioned the issue, and others have indirectly touched upon it.[5]

The Equal Protection Clause prevents governments from making improper classifications. Therefore, in presenting an equal protection claim, the court must first decide if the state has created a "classification."[6] As Professor Imwinkelried states, "[t]he basis of classification is the identity of the person asserting the right." (Here the right to interview the victim).[7] If the person seeking to interview the victim is a civil litigant, she can compel the victim to be interviewed or deposed. However, in the same courthouse, if the person seeking the interview is a criminal defendant, she is denied that same right. The end result is that even when the parties, issues, and attorney for the civil/criminal defendant are identical, the outcome is different depending on which courtroom the defendant is in.

Next, the court must decide which level of scrutiny should be applied in deciding the constitutionality of the disparate treatment. The Supreme Court has used three different tests depending on the type of classification at issue. The lowest standard of review, the "mere rationality" test, is applied to classifications involving mainly economic issues, and a classification will be deemed valid if it has some rational relationship to a legitimate government policy.

The middle test, often referred to as the "intermediate test," is applied to classifications

involving "quasi-suspect" categories (e.g., gender and illegitimacy). Here the test is whether the means chosen by the legislature serves an important governmental objective and is substantially related to the achievement of that objective.[8]

The next and most stringent test for the state to overcome is the "strict scrutiny" test. It has traditionally been applied to "suspect classifications" (e.g., race) and classifications that impair a "fundamental right."[9] The test here is whether the classification or law is necessary to achieve a compelling state interest.[10] This is the test applicable here because fundamental rights are affected by the victim's right to refuse an interview.

A criminal defendant has a fundamental right to a fair trial, to gather facts to prepare a defense, and to be free from governmental restraint. A criminal defendant whose liberty is at stake has a fundamental right to fair treatment in the criminal justice system.[11]

Moreover, many courts have indirectly held that, absent compelling circumstances, the government may not hinder or prohibit defendants from accessing information needed to adequately prepare for trial, including access to and interviewing of witnesses. For example, in *Dennis v. U.S.*, 384 U.S. 855, 873 (1966), the United States Supreme Court, in addressing a defendant's general right to discovery stated, "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact... Exceptions to this are justifiable only by the *clearest and most compelling considerations*." (Emphasis added.)

In *United States v. Cook*, 608 F.2d 1175 (9th Cir. 1979), the Ninth Circuit Court of Appeals concluded that the government hid witnesses from the defense, frustrating the defendant's pretrial investigation and preparation. The court stated:

> "As a general rule, a witness belongs neither to the government nor to the defense. Both sides have the right to interview witnesses before trial.
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> "Exceptions to this rule are justifiable only under the 'clearest and most compelling circumstances.' Where there is no overriding interest in security, the government has no right to interfere with defense access to witnesses." 608 F.2d at 1180 (Internal citations omitted.)
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> "Moreover, we have never held that security considerations preclude all defendant pretrial access to government witnesses. Our cases indicate that security concerns only justify a limitation upon the time and place of access." Id., footnote 2.[12]

The Arizona Supreme Court has stated:

> "As a matter of fundamental fairness, '...justice dictates that the defendant be entitled to the benefit of any *reasonable* opportunity to prepare his defense and to prove his innocence.'" *Murphy v. Superior Court*, 142 Ariz. 273, 277 (1984), citing *State ex rel. Corbin v. Superior Court*, 103 Ariz. 465, 468 (1968).
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> "While there is no general right to discovery in a criminal case, we have recognized that Rule 15.3 [the right to depose witnesses] is intended to effectuate the constitutional right of cross-examination contained in the confrontation clause of the Sixth Amendment of the United States Constitution." Id. (Citations omitted.)

In *State v. Radjenovich*, 138 Ariz. 270 (App. 1983), the defendant claimed his attorney was ineffective because he failed to interview the state's witnesses. In reversing the conviction, the court stated:

> "We have no hesitancy in holding that, except in the most unusual circumstances, it offends basic notions of minimal competence of representation for defense counsel to fail to interview any state witnesses prior to a major felony trial." 138 Ariz. at 274.
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> "While apparently the testimony of

> the victim and the police officers was summarized in the police reports, it is clear from the trial transcript that these summaries did not include many details which were brought out at trial. By failure of his counsel to interview these witnesses, defendant was placed at a disadvantage at trial."

138 Ariz. at 275 (Emphasis added.)

In *State v. Draper*, 162 Ariz. 433 (1989), the Arizona Supreme Court addressed the legality of a plea agreement which precluded a defendant from interviewing the victim. The court stated:

> "We agree with the court of appeals that a defense counsel's inability to interview the victim, before advising a client to enter an *Alford* plea, may render counsel's assistance ineffective...*see also* Comment, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 Ariz. St. L.J. 557, 575 ("*the single element of factual investigation of a case which defense counsel should not overlook ... is an interview with the victim*. Such an interview improves defense counsel's effectiveness in subsequent plea negotiations with the prosecution")." 162 Ariz. at 439 (Emphasis added.)

Therefore, although no court has directly addressed the issues presented here, the courts cited and quoted above indicate that compelling circumstances must exist before the government may interfere with a defendant's right to interview witnesses. Consequently, the "strict scrutiny" standard must be used in deciding the constitutionality of the differential treatment between civil and criminal litigants in the present context.

The only conceivable bases for allowing victims to refuse to be interviewed is to protect them from harassment and intimidation by defendants and their attorneys, and to minimize the pain and suffering they experience. Although protecting victims in this way might be a compelling state interest, completely denying attorneys the opportunity to interview the victim - while allowing them to interview other, possibly more sensitive,witnesses - is not necessary to achieve that end. The "strict scrutiny" test requires the state to prove the classification or law is *necessary* to achieve a compelling state interest. There are far too many alternative means of protecting victims, and the premise that they need protection from defendants and their attorneys is not empirically supported.[13]

The argument that defendants and their attorneys would or might intimidate witnesses and victims was originally used by those opposed to granting any discovery to criminal defendants.[14] In fact, the same argument was made against expanding civil discovery.[15] Obviously, these arguments were rejected in both the civil and criminal forums, and the two systems have not yet collapsed.

The supporters of the Arizona Victims' Bill of Rights did not consider any empirical data or studies supporting the perception that criminal defendants and their attorneys routinely intimidate and harass crime victims. That is not to say it does not happen; it presumably does. However, allowing victims to refuse to be interviewed is tantamount to "throwing the baby out with the bath water." Prior to the amendment's passage, thousands of victims in Arizona were interviewed by criminal defense attorneys. If harassment and intimidation by these attorneys was so rampant, there surely would be statistics evidencing such claims. To deny all contact with victims because, on occasion, a minority of attorneys might cross the line, is unreasonable. "[I]t should not be assumed a defendant [or his attorney] will act improperly without a substantial showing."[16] The general concern that victims should be accommodated does not support such an extreme measure. "The search for truth should not be made more difficult...simply because witnesses [and victims] have unfounded fears or don't want to be 'bothered' by the investigative efforts of defense counsel."[17]

In addressing the propriety of the government advising witnesses not to grant interviews to the defense unless the prosecutor was present, the D.C. Circuit Court of Appeals stated:

> "Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have an equal

> opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to....[T]ampering with witnesses and subornation of perjury are real dangers, especially in a capital case. But there are ways to avert this danger without denying defense counsel access to eye witnesses to the events in suit unless the prosecutor is present to monitor the interview. We cannot indulge the assumption that this tactic on the part of the prosecution is necessary. Defense counsel are officers of the court. And defense counsel are not exempted from prosecution under the statutes denouncing the crimes of obstruction of justice and subornation of perjury....
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> "A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined." *Gregory v. United States*, 369 F.2d 185, 188 (1966).

Why does the government assume that criminal defense attorneys are more likely to violate ethical rules and laws prohibiting harassment and intimidation of witnesses and victims than prosecutors or civil attorneys? There are many reported cases where prosecutors cross the ethical line, by withholding exculpatory evidence, presenting false evidence or perjured testimony, hiding witnesses, and otherwise influencing witnesses' testimony at trial. The same can be said for civil attorneys. As we all know, there are many more *unreported* instances of such conduct. Should we assume, based on the actions of a few prosecutors and civil attorneys, that all prosecutors and civil attorneys are unethical and dishonest?

Whether prosecutors cross the ethical line or not, it is unfair and inefficient to require defendants to rely on prosecutors to elicit from victims information that will assist their ability to effectively cross-examine witnesses and present a defense.

> "[T]here are two additional reasons why the administration of defendant's discovery rights should not be entrusted to prosecutors. First, the responsibility of the prosecutor as an advocate is so demanding of his energies and concentration that he cannot be equally attentive to the preparation of his adversary's defense....
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> "Secondly, even if the prosecutor were conscientiously dedicated to ferreting out from all that passes through his files whatever might help the defendant, unless he was initiated into all the nuances of the defense theories he would not be able to recognize much information that could render valuable service for the defendant. The defense may see significance in facts otherwise appearing neutral. Necessarily minimizing the significance of the several bits of inconsistent or contradictory data that commonly accumulate in the course of litigation, the prosecutor will often underestimate or overlook the significance that such data might have in the hands of the defendant's advocate." *Criminal Discovery for the Defense and the Prosecution - The Developing Constitutional Considerations,* 50 N.C.L.Rev. 437, 458.

Police and prosecutor prepared summaries of victim statements are not and cannot be a substitute for defense interviews.

> "...[T]he argument that there is no need for criminal depositions is based on the assumption that 'the prosecution will ordinarily possess written statements or transcripts of testimony of potential witnesses [and victims] of such completeness

> that additional interrogation by the defense attorney, prior to trial, will be of only marginal value in most cases.
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> The facile assumption in this argument is inconsistent with the theory of the adversary system. We might as well ask defendants to rely on the prosecutor to cross-examine his own witnesses at trial as assume that the prosecutor will be sufficiently diligent in his interviews with witnesses and thorough in his summary of them to protect the defendant's interests as well as his own. Moreover, the prosecuting attorney does not always interview his witnesses; often this is done only by investigating officers. It is not fair to force the defendant to rely for the accumulation of evidence necessary to him on the diligence and thoroughness of any police officer who is responsible for a particular case and who may or may not have adequate time to devote to any one case. Some witnesses may be interviewed before the full scope of the facts has become clear to the prosecuting authorities and thus before avenues of inquiry have become known to them. In addition, whoever conducted the interview for the government may not be privy to the defendant's side of the story and thus may not be alert to seemingly unimportant details that deserve to be explored." Id. at pp. 473-474.

There is no reasonable basis to deny criminal defense attorneys the right to interview victims while allowing prosecutors and civil defense attorneys to do so. Denying them access to victims, like throwing the baby out with the bath water, is an overreaction to a perceived problem that can be addressed in other less drastic ways.[18]

Of the twenty states that have enacted "victims' rights" bills, only Arizona and Idaho sanction the right of a victim to refuse a defense interview.[19] A number of the other states, recognizing that at times criminal defense attorneys may cross the line, give victims a general right to be protected from defendants and people acting on their behalf.[20]

Many states, and the federal government, permit the prosecutor to initiate civil proceedings to prevent or restrain the harassment or intimidation of a victim or witness.[21] As stated earlier, such conduct may, depending on the severity of the behavior, be unethical and illegal.

Moreover, the state could set certain conditions under which the defense would be allowed to interview victims, such as requiring the interview to be recorded and presented to the prosecutor, requiring the prosecutor or his representative to be present, requiring court approval, requiring the interview to be a formal deposition, or requiring defense attorneys to inform victims of their right to terminate the interview should the attorney behave inappropriately, with the matter thereafter to be addressed by the court.

Victim interviews "would not impose on [victims] any more than their testifying at a preliminary hearing or before a grand jury or in civil depositions. A flexible deposition [or interview] procedure could be scheduled in consultation with the witnesses [or victim]. Even granting that some imposition would be involved, such a small inconvenience to a witness [or victim], except in cases meriting a protective order, should not outweigh the fundamental right of a defendant to gather the facts necessary to his defense."[22]

I have filed and argued several motions raising these issues. To my surprise, or maybe not, the prosecutors who have opposed my motions have presented weak counter arguments. One prosecutor argued that the Victims' Bill of Rights applies equally to civil lawsuits and therefore, because the civil defendant cannot depose the victim/plaintiff, there is no disparate treatment. This claim is unsupportable. Another prosecutor argued that the victim waives her right to refuse an interview upon filing a civil complaint. However, neither he nor the trial court could respond to my reply that when there are two victims and only one files the civil complaint, the second victim can still be deposed despite there being no waiver by her.

The only argument which, at first glance, seemed to have some merit, was that the two different forums are completely different creatures and thus cannot be compared (like the apples vs. oranges analogy). The major distinctions,the prosecutor

asserted, are that in the criminal action the plaintiff is the state and is seeking criminal justice, where as in the civil action the plaintiff is a private party seeking property damages. Once again, however, neither the prosecutor nor the court responded to my predictable reaction that these distinctions actually favor the criminal defendant's argument. There is no justification for allowing a party to interview a complaining witness where the worst possible outcome of the proceeding is a loss of property, but to deny that same right to a criminal defendant whose liberty, and sometimes, life, is at stake. Furthermore, the status of the person or entity that initiated the proceedings is irrelevant; in both cases the victim is the complaining witness. Secondly, like the response to the waiver argument made above, when there are two victims and only one files a civil action, the second "non-waiving" or "non-filing" victim is in a position analogous to a victim in a criminal case. That victim did not initiate the complaint in either proceeding but can be deposed in one but not the other.

Hopefully, the next time you come face to face with the Victims' Rights Amendment, some of the issues previously discussed will help level the playing field.

1. This scheme may also violate the First Amendment because it completely prohibits defense attorneys from communicating in any way with alleged victims and because it is overbroad and vague. (*See*, generally, *Beyond the Victims' Bill of Rights: The Shield Becomes a Sword*, 36 Ariz. Law Rev. 249 (1994)). Although these issues are not addressed in this article, they should be included in any motion challenging the "victim's rights" scheme.

2. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

3. *Minder v. Georgia*, 183 U.S. 559 (1902) (but see the cases cited later indicating in certain circumstances constitutional principles do require pretrial discovery and witness interviews).

4. *See* former Rules of Criminal Procedure, Rule 15.3 and Rules of Civil Procedure, Rule 26(a).

5. *Munson v. State*, 758 P.2d 324, 331 (Okl.Cr. 1988); *United States v. Breitkreutz*, 8 F.3d 688, 691, footnote 3 (9th Cir.1993); and *Haynes v. People*, 265 P.2d 995, 996 (Colo. 1954).

6. Imwinkelried, *The Right to "Plead Out" Issues And Block The Admission Of Prejudicial Evidence: The Deferential Treatment Of Civil Litigants And The Criminal Accused As A Denial Of Equal Protection*, 40 Emory Law Journal 341, 359 (Spring 1991)) (Hereinafter "Imwinkelried".)

7. Id. at p. 360.

8. *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

9. *Friedman v. Rogers*, 440 U.S. 1, 17 (1979) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966).

10. *Eisenstadt v. Baird*, 405 U.S. 438, 447, n.7 (1972).

11. Imwinkelried at p. 369-370, (Citing J. Nowak, R. Rotunda & J. Young, Constitutional Law §14.41, at 785 (3d ed. 1986).

12. See also *United States v. Murray*, 492 F.2d 178, 194 (9th Cir. 1973) (same language is in *Cook*, citing *Dennis v. United States*, 384 U.S. at 868-876.)

13. As many of us know from our own experiences, preventing defense attorneys from interviewing witnesses may have the opposite effect of that intended by victim's rights advocates. That is, the victim may be forced to go through the ordeal of testifying at trial, experiencing vigorous and aggressive cross-examination, when, had she granted an interview, the defendant, learning of the victim's quality as a witness, may have agreed to plead guilty before trial; or the prosecutor, seeing the weaknesses in the case, may have made a better offer or even dismissed the case.

14. See, Lafave, Criminal Procedure, § 19.3(a), page 479, and generally, *The Criminal Prosecution: Sporting Event Or Quest For Truth?* (William Brennan, Jr.) 1963 Wash. U.L.Q. 279, 290.

15. Lafave at p. 479.

16. Id.

17. Id.

18. See, *Delaware v. Van Arsdall* (1991) 475 U.S. 673, 679, and *Rock v. Arkansas* (1987) 483 U.S. 44, 56.

19. See, Idaho Const. Art. I §22(8).

20. See, Missouri Const. Art. I §32(6), New Mexico Const. Art. I §24(3), and Wisconsin Const.. Art. I §9m.

21. e.g., "The Victim and Witness Protection Act of 1982," 18 U.S.C. §3523, Cal. Penal Code §136.2(a)(c), and Nev. Rev Stat. §33.015.

22. Criminal Discovery For The Defense And The Prosecution---the Developing Constitutional Considerations, 50 N.C.L. Rev. at 473. ■